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AUTHORITIES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

L. VOGELSTEIN & COMPANY, APPELLANT, *v.* THE UNITED STATES.	No. 269.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues. The suit was brought to recover the sum of four hundred twenty-four thousand one hundred ninety-six and 54/100 ($424,196.54) dollars, together with interest, which amount is alleged to have been the difference between the price paid by the Government for 12,542,857 pounds of copper at 23½ cents a pound and what would have been a just and fair compensation for the same, which is alleged to be slightly in excess of 26.88 cents per pound. From the findings by the Court of Claims the following facts appear:

The plaintiff is a New York corporation with a capital stock of $5,000,000 divided into 50,000 shares, L. Vogelstein being the real owner of all, or substantially all, of them. Its business was and is the purchasing of ores, having them smelted and refined and then selling the refined ores to its customers. It is not a mine owner, operator, producer, or refiner. (First and second findings, p. 7.)

At the close of business on September 20, 1917, the plaintiff had on hand, sold but not delivered, and unsold, 43,851,042 pounds of copper, 34,687,579 pounds of which had been purchased as unrefined copper under long term contracts, and 9,163,463 pounds had been purchased as refined copper in the open market. The cost of the entire mass was $11,780,027.17, the average cost per pound being 26.881977 cents. Of this entire stock 31,308,183 pounds had been sold at 26.34389 cents per pound. There remained in the ownership and possession of the plaintiff 12,542,857 pounds which it had been unable to sell at the same price owing to the fact that an agreement between the producers of copper and the Government fixing the price of refined copper at 23½ cents per pound would go into effect on September 21, 1917. The difference between the average cost price of the 43,851,042 pounds and the selling price fixed by the agreement was 3.381977 cents per pound. *After September 20, 1917, the market price of copper was 23½ cents per pound.* (Third finding, p. 8.)

There is nothing in the evidence nor in the records of the plaintiff to show the actual cost of the 12,542,857 pounds of unsold copper. All the unrefined copper purchased by the plaintiff was shipped directly to the United States Refining Company under a contract between the plaintiff and that company, and after smelting and refining it was shipped on order of the plaintiff by that company to plaintiff's customers. It was impossible for the plaintiff to give, from its records, the cost price of any of the different lots of copper sold by it. It may have sold copper purchased by some other dealer. It only knew how much copper it had in bulk at the refinery. (Fourth finding, p. 8.)

Prior to September 21, 1917, and after the presentation of a report by the Federal Trade Commission, the War Industries Board called before it the copper producers of the country and gave notice to the public of such meeting in order that all interests might be represented. After discussion between the copper producers, represented by a committee, and the War Industries Board, a voluntary agreement was reached which was approved by the President on September 21, 1917. A memorandum of that agreement is set forth in the fifth finding (p. 8). This agreement fixed the price of copper at 23½ cents per pound, f. o. b. New York, subject to revision after four months.

The meeting on September 28, 1917.

For the purpose of carrying into effect that agreement, a meeting of copper producers was called by the Commissioner of Raw Materials of the War Industries Board for September 28, 1917. At that meeting Mr. Vogelstein was present and a motion was unanimously adopted providing for a committee, to be known as The Copper Producers' Committee, to act for the copper producers in carrying out the agreement of September 21, 1917. The representatives present were asked to submit to Mr. Brush, secretary of the committee, prior to noon September 29th, a statement of their estimated stock of copper on hand October 1st, together with their estimated production for the months of October, November, December, and January, together with a further statement covering all outstanding sales due as of October 1, 1917, for delivery prior to February 1, 1918. No objection was raised to the statement that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the United States Government and its allies. Upon the plea of Mr. Eugene Meyer, Jr., that the Government was in immediate need of about 12,000,000 pounds of copper, it was agreed that Mr. Wolfson, secretary of the Advisory Committee, should receive instructions from the Ordnance Department to ship immediately 12,000,000 pounds of copper, and several of the producers present agreed to receive such instructions in quantities agreed upon with Mr. Wolfson. Mr. Vogelstein was

present at this meeting and placed in nomination the persons who were elected members of the Producers' Committee, and he made no objection to furnishing copper at the price fixed in the agreement. (Sixth finding, pp. 10 and 11.)

At this meeting Mr. Meyer, who was present at the request of the Commissioner of Raw Materials of the War Industries Board, and who had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and drawn up under the provisions of Sections 120 and 123 of the Act of June 3, 1916, 39 Stat. 213, commonly known as the National Defense Act, distributed the orders among the producers and dealers present. Two for 1,000,000 pounds of copper each were handed to the plaintiff. *This was done at their request in order that they might be protected from suits for damages for breech of contract with their private customers, and not because the Government intended to procure copper under such orders* (p. 11). The orders were all identical except as to the person addressed and the amount of copper to be furnished. The two orders given to the plaintiff are set forth in the seventh finding of fact, page 11.

It was understood and agreed between the producers and dealers in copper, including the plaintiff and the United States, that no copper would be required by the United States under the mandatory orders referred to, but that the 12,000,000 of copper named would be obtained in the usual way through

the contracts between the United States and the United Metals Selling Company which were entered into from time to time, beginning April 6, 1917. The form of this contract is set forth in the eighth finding, beginning on page 12. It is a contract between the United Metals Selling Company and the United States of America, represented by Colonel Hoffer, Ordnance Department, United States Army, as contracting officer, whereby the contractor agreed to make and deliver to the United States 65,000,000 pounds, more or less, of refined copper. It seems to be unnecessary to consider all the provisions of this contract, and it is sufficient to say that it provides with great detail as to the place of delivery, time of delivery, delays, payments, disputes, etc., and fixes as the price to be paid by the United States 23½ cents per pound, f. o. b. cars, New York.

The Government's method of obtaining copper.

The plan adopted for obtaining the copper by the Government was for the War and Navy Department to send an order to the United Metals Selling Company directing it to ship a certain number of pounds of copper to some specified party on bills of lading forwarded with the order. This order was sent to the Producers Committee, which returned it to the United Metals Selling Company with the name of the producer or dealer, on whom the order should be made, endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by the Producers

Committee, requesting that it "please ship" a certain number of pounds of copper to a designated party at a certain time on the attached bill of lading, giving the numbers of the same and also the number of the contract with the Government against which the order was shipped and stating the price to be paid as 23½ cents per pound. No order was placed with the United Metals Selling Company by the Government unless there was a contract with the company against which it could be charged. Sometimes an order would be sent in advance of the contract, but the contract would always follow. (Ninth finding, page 17.)

The first contract between the United States and the United Metals Selling Company was dated April 6, 1917, and called for the delivery of 20,000 000 pounds of copper at a little more than 16.67 cents per pound. In all nine contracts were made, the last being dated March 20, 1918, and the price named in each except the first two was 23½ cents per pound. The total number of pounds which the company agreed to deliver was 343,336,734, and the number of pounds delivered under the procedure herein set forth, from September 21, 1917, to Februray 21, 1918, a period during which the copper out of which this suit arose, was in round numbers 283,000,000 pounds. (Tenth finding, p. 17.)

Orders were placed by the United Metals Selling Company with the plaintiff in accordance with the procedure described in the ninth finding at various times between September 21, 1917, and February 1,

1918, for different amounts of copper. The plaintiff thereupon issued its order to the United States Metals Refining Company to ship the copper as requested by the order of the United Metals Selling Company on bills of lading furnished with the order. During that period the plaintiff shipped in this way among other copper the 12,442,857 pounds which remained unsold in its possession, as before described, and received from the said Selling Company 23½ cents per pound. (Eleventh finding, p. 17.)

The Council of National Defense was created by Section 2 of the Act of August 29, 1916, 39 Stat. 649, 650, "for the coördination of industries and resources for the national security and welfare." It consisted of the Secretaries of War, Navy, Interior, Agriculture, Commerce and Labor. Among its other powers was authority to organize subordinate bodies for its assistance in special investigations, and, in pursuance thereof, by resolution of March 31, 1917, it organized the General Munitions Board, by one clause of which it provided that "such committee shall have no authority at this time to issue purchase orders, make contracts, or bind the Government in the purchases; all these things to be done as at present by the respective departments." And by resolution of July 28, 1917, the Council organized the War Industries Board to supersede and take the place of the General Munitions Board. (Thirteenth finding, p. 18.)

The fourteenth finding of fact made by the Court of Claims was as follows (p. 18):

The evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to place, any mandatory orders under the act of June 3, 1916, with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other metal.

The judgment of the Court of Claims was rendered on June 13, 1921. Thereafter, on August 11, 1921, plaintiff filed a motion for a new trial and to amend findings. On October 10, 1921, the court overruled the motion. On October 16, 1922, the appellant submitted a motion to this court to remand to the Court of Claims, for further finding of fact, and on October 23, 1922, this court announced that the motion had been reserved for consideration in connection with the whole case on the merits.

The Baruch Report.

In appellant's brief reference is made to the report of the War Industries Board made by Mr. Baruch, its chairman, as described in its motion to remand. From this report it appears that "The War Industries Board remained a subordinate body to a council having advisory powers only." (Motion to remand, pp. 36, 37.)

This report, in discussing the matter of copper, says that the Board's first action was an appeal to the large producing and smelting interests, and that this appeal resulted on March 20. 1917, in an understanding by which the Army and Navy were enabled to

purchase their requirements to be delivered quarterly for a year, at a little over 16.67 cents a pound, which represented the actual average price obtained by the United Metals Selling Company over a period of ten years from 1907 to 1916. The market quotations for that date were 35.74 cents per pound, and sales were being made as high as 37 cents. The copper industry was the first one to come forward with its offer, and followed, as it was, rapidly by other trades to sell to their own Government its war needs at prewar prices had an important psychological effect upon prices generally. The agreement of September 21, 1917, was the first "negotiated price-fixing arrangement ever established by the United States Government; * * * The industry, though dissatisfied, had finally acceded. They believed that at least it gave them a definite program and would bring stability." Within a week many questions began to arise with respect to the administration of the scheme, and among the other questions decided was that all outstanding bona fide contracts between producers and consumers might be consummated at contract prices. Some of these were 27 cents per pound, but under the priority agreement the Government had first call and the Allies second, and as these two purchasers consumed nearly all of the supply, few high priced orders could be filled. (Ibid. pp. 38 and 39.)

Appellants' "protests."

With respect to the so-called protests made by Mr. Vogelstein, it appears from the motion to remand that

on the 27th of September—that is, the day before the meeting which Mr. Vogelstein attended in New York—he met by appointment Mr. Meyer, in Washington. (Ibid. p. 55.) He told Mr. Meyer that he had not been consulted and considered it monstrous that he should be called upon to deliver copper for less money than it had cost. Mr. Meyer stated that he was very sorry that somebody had to get hurt, and "he was sorry that it was me." He also saw Mr. Wolfson and Mr. Clendenin. After Mr. Vogelstein attended the meeting in New York on September 28th, at which he acquiesced in everything that was done and asked to have one of the so-called mandatory orders given to him, his company wrote a letter to Mr. Baruch on October 8, 1917, in which he points out that the price, as fixed, was "fair enough for copper to be thereafter provided," and says:

> Importers, however, were not considered. They were compelled by outstanding contracts with foreigners to accept ores and pay for same at Engineering & Mining Journal prices in some cases at dates of shipment, which prices were much higher than 23½ cents. This material having to arrive and be refined the copper was not available for months later. It having been pointed out last spring that the Government was contemplating the fixing of a reduced price for copper, consumers deferring purchasing except for absolute needs, we were, therefore, unable to sell all of this imported copper. (Ibid. p. 59.)

It appears, therefore, that the real contention of the appellant is based upon the fact that on September 21, 1917, he was unfortunate enough to have acquired, many months before, about 12,000,000 pounds of copper which he had been unable to dispose of because of the feeling in the copper trade that the Government would soon fix a lower price than that which prevailed in the market.

His grievance is set forth in a proposed finding (motion to remand, p. 54) as follows:

> But, before furnishing any copper to the Government and while furnishing the said 12,542,857 pounds, plaintiff did protest to the Government against the price of 23½ cents per pound for that copper; and those protests were made on the ground that 23½ cents per pound was not fair and just compensation for said 12,542,857 pounds of copper, because it had necessarily cost the plaintiff 26.881977 cents per pound, and said exception is taken upon the ground that the facts proposed to be found are ultimate and material to claimant's case and are established by the following uncontradicted evidence, cited in support of said motion:

This is really the point of the case: whether or not plaintiff was entitled to receive more for his copper than its fair value *as copper*, because it had cost him more.

Before the 21st day of September, 1917, the plaintiff endeavored to limit, as far as possible, the amount of copper which it accepted under its outstanding con-

tracts, and endeavored to impress upon all shippers that it was really their price which had been fixed and that there was no reason why they should be better off under the presidential proclamation than others. It was unsuccessful in impressing this view and was forced to live up to its contracts, but it did not take an ounce beyond what it was forced to take. (Motion to remand, page 43.)

Mr. Vogelstein testified (motion to remand, p. 44) that against the purchases which appellant was in the habit of making from day to day, it endeavored to sell at a profit whatever quantities it was buying and always had a certain bulk of purchased material against which it had a certain bulk of sold material. Sometimes the purchases were ahead of the sales, and at other times the sales were ahead of the purchases. In the period terminating the 21st of September, 1917, it had endeavored to balance its purchases by sales, and in that endeavor had sold copper right along below cost with a loss, with the idea of taking a small loss rather than to hold onto it.

In the conduct of its business it was desirable from time to time to limit the risk and it went into the market and bought refined copper if it felt that it had sold more copper on a certain date than was safe. The copper business is not an exchange business; it comes sporadically, and "you sometimes, in order to make a sale, have to sell more than suits your position or suits your judgment." (Ibid. pp. 45, 46.)

On October 8, 1917, plaintiff wrote a letter to Mr. Baruch, in which he says that the copper price fixed

by an agreement between the Government and the producers was fair enough for copper to be thereafter provided, because producers could adjust their affairs to producing copper at the new price, but felt that as to its unsold balance of imported copper it stood on a different footing. In this letter it states:

> We do not wish, however, to do anything without your entire concurrence and approval. We feel that the injustice of taking at 23½c copper which cost us in cash much more is manifest and so we ask that you take this one feature under consideration with a view to a fair adjustment.
>
> We are entirely at your service to present this matter in detail or to furnish any facts or information which may be of service to you. (Ibid. pp. 59, 60.)

On November 15th the plaintiff addressed a letter to the Raw Materials Division of the War Industries Board, in which it sets forth that:

> We are largely importers of copper ores and occupy a unique position in the trade. For reasons hereafter stated we were compelled without intent or fault on our part to accumulate a large stock of crude material at prices averaging slightly below 27 cents per pound for copper contents. Standing in the unique position of importers we were not considered when the price was fixed by the producers and the Government, and the result is that entirely inadvertently we are singled out to bear large losses not sustained by the metal dealers generally, in that a large stock of unrefined

> copper which cost us nearly 27 cents per pound of copper contents is now taken and must be sold at 23½ cents per lb.
>
> We appreciate the necessities of present conditions. We recognize the propriety of the acts of your board in fixing a price for copper. We have done, and will do, all that we can to uphold and cooperate with your board.

And the letter asks that a full inquiry be made into its case, which it feels confident will convince a fair-minded body that "we are justly entitled to consideration." (Ibid. pp. 60, 61.)

After the meeting of September 28, 1917, plaintiff was requested to consent to supplying copper to the Government according to the plan set forth in finding No. 9, and at first objected to doing so, but thereafter withdrew its objection and consented to that plan. On October 15, 1917, the Copper Producers' Committee wrote to the plaintiff, stating in substance that (with reference to the requisitions distributed by Mr. Meyer at the meeting on September 28th) complications had arisen which made it necessary to handle the 12,000,000 pounds as one contract between the United States Government and the United Metals Selling Company; that, in order to make the plan effective, it was necessary for each one of the companies who received the original requisitions from Mr. Meyer to write to the Ordnance Department at Washington and request that the contract be made direct with the United Metals

Selling Company, and urging the plaintiff to write such a letter. The Committee would then assemble all the letters and forward them to the Ordnance Department. In response to that letter the plaintiff did as requested. (Ibid. pp. 63, 64.)

ARGUMENT.

I.

In furnishing copper at the fixed price, appellant did not act under duress in any legal sense.

Prior to September 21, 1917, Vogelstein & Company found itself in this situation: It was not a mine owner, producer or refiner, but had been in the business of purchasing ores, having them smelted and refined, and selling the refined products to its customers. In the course of its business it would buy ores and make sales against its purchases. It would also sell copper and purchase against its commitments. In the language of the market place, sometimes it would be "long," and sometimes "short," of copper. There had been, after the breaking out of the world war, a great advance in the price of copper, and much speculation. The average price over a period of ten years from 1907 to 1916 had been between 16 and 17 cents a pound. On March 20, 1917, the market quotations were over 35 cents a pound, and sales were being made at 37 cents. When it became understood that in all probability a price would be fixed, the market declined rapidly. Between that date and September 21, Vogelstein & Company did their best to limit their purchases of copper and

also to get rid of what they had on hand and actually sold more than 31,000,000 pounds at less than cost; but, in spite of all they could do, they found themselves in the unfortunate situation of being long about 12,000,000 pounds of copper, while, in the vernacular, "the bottom had dropped out of the market."

In this situation Mr. Vogelstein bestirred himself. He came to Washington and saw Mr. Baruch and Mr. Meyer and besought their help. He made no claim that 23½ cents a pound was not a fair price for copper. His complaint was solely upon the ground that he was entitled to special consideration because his copper had cost him more than 23½ cents. Special emphasis is laid upon the claim that the appellant "necessarily" or "unavoidably" had this copper, and the court is asked to remand the case for a finding of this fact. But this can mean nothing more than that it had misjudged the copper market during the preceding months and possibly years. The copper which appellant had did not represent any specific amount purchased at a specific price at a specific time, but was a balance from many purchases and sales at various prices, and its cost was an average of many transactions. Vogelstein & Company had misjudged the market, and had the copper "unavoidably" merely because they had bought more than they had been able to sell before the market went against them. Their situation, while unfortunate, was no different from that of any man who had been trading in a fluctuating market in a commodity

and the like that would arise," was selected, the members of that committee were placed in nomination by the plaintiff. He made no objection to furnishing copper at the price fixed in the agreement of September 21, 1917. Among the other things done at the meeting was to request those present to submit to the secretary of the committee a statement covering all outstanding sales for delivery prior to February 1, 1918, and it does not appear that Mr. Vogelstein claimed that he had any such outstanding commitments. In fact, it is quite clear that he did not have any, because if he was "necessarily" long of his copper it meant that he had no such outstanding commitments, and furthermore, within a week, the agreement was modified so as to permit delivery under all bona fide outstanding contracts.

During the progress of the meeting it appeared that Mr. Meyer had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and that he distributed these among those present *at their request, in order that they might be protected from suits for damages for breaches of their contracts* with private customers, and *not because the Government intended to procure copper under such orders.* Two of these orders, each for 1,000,000 pounds of copper, were handed to the plaintiff. Though he had no outstanding contracts, the reason why he desired to obtain these orders is not difficult to determine. This present suit affords the answer. Though he had been endeavoring for months to sell his copper

at a price sufficient to secure him against loss, he had been unable to do so, and of course he knew that he could not sell it in the market for more than 23½ cents a pound. But if he could get the Government to commandeer it, and if he protested loudly enough, he would get his 23½ cents anyway and might acquire a cause of action against the United States at the same time. The only customer from whom he could hope to get more than 23½ cents was the Government; hence his desire for a commandeering order. It is to be noted, however, that there was no sign of protest from him then. He agreed with everything done and raised no objection to furnishing the copper at the agreement price (p. 11). It may be that he was attempting to "beguile the time." In appellant's brief, page 28, it is stated, referring to the price of 23½ cents a pound:

> There is nothing whatever to show that at the meeting of Sept. 28, 1917, that price was mentioned, or that anything was done or said that should have called forth any protest.

This is not quite candid. The minutes of the meeting show that Messrs. Clendenin and Wolfson reported the result of the negotiations which led to the agreement "fixing the price of copper referred to in the statement made public by the President, September 21, 1917, and suggested the necessity of a committee to act for the copper producers in the premises" (p. 10). That was what the meeting was for. Mr Vogelstein knew all about the agreement of September 21, and had been to Washington the day before

to see Mr. Meyer about it, and the two orders which he commandeered at the meeting stated that the price to be paid would be 23½ cents per pound (p. 12). It may be true literally that this price was not mentioned. Perhaps it was taken for granted. But to imply that these gentlemen attended this meeting, placed their resources at the disposal of the Government, appointed a committee to carry out the agreement, and accepted the orders as protection against suits for breach of contract, without thorough understanding of the fundamental fact that the price was 23½ cents a pound, and that they were to receive that and no more for their copper, is to cast unmerited reflection upon their very great intelligence.

However, Mr. Vogelstein, as the Court of Claims finds, raised no objection to the statement "that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the United States Government and its allies" (p. 10), and raised no objection to "furnishing copper at the price fixed in the agreement" of September 21 (p. 11). When he succeeded in getting the two orders signed by the Secretary of War, it may be that he felt that he had found a way to get more for his copper than the agreed price, but if so, he must have experienced a sense of disappointment when he found shortly afterward that there was to be no commandeering; that all the copper was to be furnished by the United Metals Selling Company under contract. Though he objected to this, nevertheless his company consented to it in writing.

Thereafter all copper furnished by the plaintiff was furnished under that arrangement. The copper supplied by the plaintiff was furnished to the United Metals Selling Company, it received from that company compensation at the agreed rate of $23\frac{1}{2}$ cents per pound, and, as the Court of Claims finds, the evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to place, any mandatory orders with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other material.

It seems to us that these facts carry with them an unanswerable argument against the claim of the plaintiff. The copper was not requisitioned or commandeered by the Government. This procedure was abandoned with the consent of the plaintiff. The Government did not obtain the copper from the plaintiff in any way, nor was the plaintiff known to the respective parties of the Government in the transaction. The Government's dealing was wholly with the United Metals Selling Company, and its relations with that company were purely contractual. The dealings between the plaintiff and the United Metals Selling Company were wholly voluntary, the result of an agreement made at a meeting which Mr. Vogelstein attended and in which he not only participated actively but in which he seems to have been a leading spirit. In a general way he may have yielded to the situation more than he would have done under other circumstances. It may well be

that pride made him reluctant to antagonize the most prominent and influential men in the copper industry. It may have been patriotism.

Perhaps, as a shrewd business man, he was making the best of what was to him a bad situation. Neither the War Industries Board, the Copper Producers' Committee nor the United Metals Selling Company had commandeering authority, and neither attempted to exercise that power. The only commandeering orders issued by the Secretary of War were later superseded in the manner hereinbefore pointed out. If the plaintiff had desired to put itself in the position to sue anybody, it should have refused to fill the orders placed with it by the United Metals Selling Company or declined to do so until proper requisitions or commandeering orders were issued.

The case of *American Smelting & Refining Company* v. *United States*, decided by this court on May 15, 1922, involved the claim of over $500,000 for the price of about 20,000,000 pounds of copper at 26 cents a pound, less payments received at 23½ cents. The Government had some correspondence with the United Metals Selling Company, ending in an order or proposal for 30,000 metric tons of copper to be delivered on or before June 1, 1918. The company replied on March 26th that the Copper Producers' Committee had divided the handling of copper and had given the export business to the American Smelting & Refining Company. The letter requested that the order be changed to apply to the last-named company. There was further correspondence which

amounted, as this court held, to a contract. All the copper was delivered prior to July 2, 1918, except the 20,000,000 pounds in controversy. This copper it was impossible to deliver until after that date. No shipping orders for it had been received, and after that date the price of copper was advanced by the price fixing committee to 26 cents a pound, and the American Smelting & Refining Company claimed that it was entitled to that price. In its opinion, delivered by Mr. Justice Holmes, this court said:

> The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did nor discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered. As was pointed out by the Court of Claims, the acceptance was sent because the claimant was advised by the Government that no payment could be made until the claimant had accepted in writing the Government's proposal, whereas no acceptance was necessary if the order was a compulsory requisition. We are of opinion that the claimant must stand upon the letters of March 28 and April 11. * * *
>
> * * * We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its

> ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made.

Much of this reasoning applies to the present case. The appellant did not stand upon any legal right. At the meeting on September 28 it entered into the agreement there made. Afterwards, when requested to become a party to the agreement to sell through the United Metals Selling Company, it agreed. It did not have to do so, if its copper had been requisitioned.

II.

Appellant's so-called protests were not based on any legal ground.

Appellant made, so far as appears, no protest to the Secretary of War or any other officer clothed with actual power; nor did it claim that the price fixed was not a fair price for copper. Mr. Vogelstein's general attitude was that of a man trying to get Mr. Baruch and Mr. Meyer to help him obtain special consideration. When they declined, he joined in with the other members of his group. If he had refused to deliver copper to the United Metals Selling Company without formal requisitions orders, they might not have been forthcoming at all. That company might have declined to do business with Vogelstein & Company, and obtained its copper from the producers, who were supplying it in immense quantities. The Government might have deemed the comparatively small quantity of Vogelstein's copper of so slight importance as to be disregarded.

Indeed, it would seem as if the doctrine of estoppel would bar the plaintiff's claim as against the Government. The Government was dealing with the United Metals Selling Company. All of its payments were made to that company. It had no reason to suspect that the price it was paying to that company for its copper was not being received in full, and, if it had been informed that one of the firms, which was supplying a small quantity of copper, proposed to sue the Government for additional compensation upon the ground that its copper was being commandeered at an unfair price, it might have told that company not to accept any orders from Vogelstein & Company. Indeed, if the Producers' Committee had entertained any idea that Vogelstein & Company were not honestly and in good faith coöperating with the rest of them in their scheme, thay might very well have refused to have any dealings with them, and Vogelstein & Company would then have been left in the position where they would have had to sell their copper to some one else at 23½ cents, hold it or wait for it to be commandeered. If they had sold their copper to other purchasers at 23½ cents per pound, they would clearly have no claim against the Government. *Morrisdale Coal Company* v. *United States*, decided May 29, 1922. If they had held their copper indefinitely, it is a problem what would have been done with it. What they actually did now appears to have been a seeming compliance with the situation and a coöperation with all the other men engaged in the same industry, but with the lurking hope that,

through the present suit, they would really fare better than any of their fellows; that by process of law the public treasury would make good the losses which they have sustained by improvident speculation in copper.

III.

Appellant received just compensation for its copper.

But even if it be held that the plaintiff's copper was requisitioned, the record, nevertheless, shows that the price paid was fair and just compensation. As has already been pointed out, it was the price agreed upon by the trade at large as a fair price. In that respect it represents the uncontradicted testimony of the most expert witnesses in the country. It was the price at which the producers sold not only to the Government but to the public at large. It was the "market price," as the Court of Claims finds as a fact (p. 8).

Appellant, therefore, received just compensation for its copper.

Mr. Justice Brewer, speaking for the Court and considering the meaning of the words "just compensation" in the Fifth Amendment, said in *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 326:

> "* * * the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.'" * * * And this just compensation, it will be noticed, is *for the property*, and *not to the owner*. (*Italics ours.*)

Compensation must be just "not merely to the individual * * *, but to the public * * *." *Bauman* v. *Ross*, 167 U. S. 548, 574.

> "'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not a speculative value; not a value obtained from the necessities of another." *Lawrence* v. *City of Boston*, 119 Mass. 126, 128.

Even Mr. Vogelstein admits that the price was fair for copper, and his only claim for more is because his particular copper cost more. But what the owner is entitled to receive is the value of the property "without reference to the person of the owner or the actual state of his business." *Pittsburgh & Lake Erie Railway Company* v. *Robinson*, 95 Pa. St. 426, 430.

The price paid by the appellant under the circumstances of this case is no evidence of actual value. All refined copper of the kind furnished is alike. No private purchaser would think of paying Vogelstein & Company more for copper than was charged by other dealers, merely because they had bought while the market was high. And neither Vogelstein & Company, nor any other business man, would for a moment expect anybody but the Government to pay them more than the market price. If Vogelstein & Company had been unfortunate enough to have acquired their 12,000,000 pounds while the market price

was 35 cents a pound, we do not think they would for a moment make the claim that the Government should pay them that price for it, and if, on the contrary, they had been shrewd enough to have acquired the 12,000,000 pounds while the price was 15 cents a pound, the Government would not have been justified in refusing to pay them less than 23½ cents a pound. In other words, the Government was paying Vogelstein & Company a fair price for copper, neither attempting on the one hand to make good their losses, nor on the other hand to deprive them of a profit. The value of a pound of copper to-day is the same whether it was purchased yesterday at 25 cents a pound or ten years ago at 16 cents a pound, and the value of the copper owned by Vogelstein & Company on the 28th day of September, 1917, was neither greater nor less because it had cost them 35 cents a pound or only 16 cents a pound, or than it would have been in the hands of another firm which had paid more or less for it.

The market value of refined copper of the grade mentioned in the contract with the United Metals Selling Company was, on the 28th day of September, 1917, 23½ cents a pound, a price taking into consideration all varying costs of production, insuring to labor the maximum wages and affording a profit which would be an incentive to maximum production. What fairer basis of market value could be found? It was the price at which 283,000,000 pounds of copper was sold to the Government between Sep-

tember 21, 1917, and February 1, 1918, by the United Metals Selling Company. It was the price at which, as alleged in appellant's petition (p. 5), it purchased at least 25,000,000 pounds of copper or, as stated in its brief (p. 36) upward of 50,000,000 pounds, which it sold to the Government. So if the Government did actually requisition the 12,000,000 pounds in suit, appellant could have replaced it at 23½ cents in the market, and the price at which property can be replaced in the open market is full compensation for its loss. *Woonsocket Mach. & Press Co.* v. *N. Y., N. H. & H. R. R. Co.*, 239 Mass. 211.

These considerations lead to the following conclusions:

(1) The plaintiff did not act under duress in any legal sense of the term. Pride, patriotism and business sagacity may have exerted an influence, but the fact remains that Vogelstein & Company allied themselves with the other men in the copper trade in a voluntary agreement to furnish copper to the United States and its allies at an agreed price.

(2) Such protests as were made were in substance merely personal appeals to influential men like Mr. Meyer and Mr. Baruch for special consideration and were not assertions of any intention to stand upon legal rights. Indeed, they were not based upon any legal right unless the Government, in taking a commodity with a recognized market value like copper, must pay not the market price but a price to be determined by the needs, conditions and previous dealings of each particular owner.

(3) Whether requisitioned or not, the plaintiff received just compensation for his copper; that is, the fair market price—the price which all the great producers of the country had agreed upon, not merely as the price at which they would sell to the Government but the price at which they would sell to the general public—the price which the Court of Claims has found as a fact was the market price of the copper furnished.

CONCLUSION.

The motion to remand should be denied. The additional findings which the appellant desires to have made are immaterial in view of the findings which have been made.

The judgment of the Court of Claims should be affirmed.

James M. Beck,
Solicitor General.

Alfred A. Wheat,
Special Assistant to the Attorney General.

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